STATE OF MICHIGAN

IN THE SUPREME COURT

CITY OF COLDWATER,

Plaintiff-Appellee,

v

CONSUMERS ENERGY COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. 151051

Court of Appeals No. 320181

Branch County Circuit Court
LC No. 13-040185-CZ

Hon. P. William O'Grady

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CONSUMERS ENERGY COMPANY'S

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction under MCR 7.301(A)(2) to grant leave to appeal from the Court of Appeals' opinion entered on January 6, 2015.

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Consumers Energy Company (Consumers) seeks leave to appeal from the Court of Appeals' published opinion (attached as Exhibit 1)[1] affirming the Branch County Circuit Court's decision (attached as Exhibit 2) granting summary disposition to Plaintiff-Appellee, the City of Coldwater (Coldwater). The Court of Appeals held that Michigan Public Service Commission Rule 411 and MCLA 124.3(2) do not apply to Coldwater's provision of electric service to property (outside its corporate boundaries) it purchased in July 2011, which at the time of purchase was being served electricity by Consumers.

The Court of Appeals held that Coldwater was exempt from Rule 411 as it is a municipal utility regardless of whether it is or was a customer of a public utility and regardless of whether property it acquired had been previously served by a public utility. This was despite this Court's holding in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27, 41-42, 799 NW2d 155 (2011), that the first utility to serve a property (here, Consumers) has the right to continue serving the property, even if the customer changes, the service is interrupted or if the building being served by the first utility is torn down. This Court held that the right to serve the property continues with the property and Rule 411 binds future customers and utilities, whether a municipal utility or not. In *Great Wolf Lodge*, this Court held that a customer may not "circumvent" Rule 411 "by attempting to receive service from a municipal corporation not subject to PSC regulation." *Id.* at 42. Here, Coldwater seeks to circumvent Rule 411 by

[1] The Exhibits referenced in this Supplemental Brief are attached to Defendant-Appellant's initial Brief and can be found there.

providing electric service to a parcel of property that it now owns. Under this Court's reasoning in *Great Wolf*, it should make no difference who owns the property, but rather what utility was first to serve the property. This Court's review is thus necessary to answer the question created by the Court of Appeals: whether a municipal corporation that acquires property that was first served by a public utility can make that property no longer subject to Rule 411 via either temporary discontinuance of the service or by a change in ownership of the property to the municipality.

The Court of Appeals also held that MCLA 124.3(2) did not apply to this case, creating a distinction between the definition of customer found in Rule 411 (and as defined by this Court in *Great Wolf Lodge*) and the way the Court of Appeals believes customer should be defined in MCLA 124.3(2). This was despite this Court's holding in *Great Wolf Lodge*, that the first utility to serve a property (here, Consumers) has a continuing right to serve the property/premises, even if the customer changes, the service is interrupted or if the buildings being served are torn down. In essence, the Court of Appeals has used the definition it created of customer in MCLA 124.3(2) to create an exception to MCLA 124.3(2) rendering it both nugatory and in conflict with Rule 411 and the holding of *Great Wolf Lodge*. This Court's review is thus necessary to firmly establish the definition of customer, a new question created by the Court of Appeals.

STATEMENT OF QUESTIONS PRESENTED

1. Whether Michigan Public Service Commission Rule 411, as interpreted by this Court in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27; 799 NW2d 155 (2011), prohibits municipal utilities from providing electric service to the premises of a customer first served by a PSC-regulated public utility when that customer is a municipality.

Court of Appeals says:	No
Trial court says:	No
Plaintiff City of Coldwater says:	No
Defendant Consumers Energy Company says:	Yes

2. MCLA 124.3(2) prohibits a municipal utility from rendering electric service to a customer outside the utility's corporate limits that is already receiving service from another utility unless the serving utility consents in writing. Can a municipal utility avoid this restriction based on a break in service or by acquiring the property itself?

Court of Appeals says:	Yes
Trial court says:	Yes
Plaintiff City of Coldwater says:	Yes
Defendant Consumers Energy Company says:	No

PRINCIPAL STATUTES AND RULES INVOLVED

MCLA 124.3(2) states:

> A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing. [MCLA 124.3(2)]

MCLA 460.10y, in part, states:

> **Municipally owned utilities; alternative electric suppliers; delivery services**
>
> * * *
>
> (2) Except with the written consent of the municipally owned utility, a person shall not provide delivery service or customer account service to a retail customer that was receiving that service from a municipally owned utility as of June 5, 2000, or is receiving the service from a municipally owned utility. For purposes of this subsection, "customer" means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service.
>
> (3) With respect to any electric utility regarding delivery service to customers located outside of the municipal boundaries of the municipality that owns the utility, a governing body of a municipally owned utility may elect to operate in compliance with R 460.3411 of the Michigan administrative code, as in effect on June 5, 2000. However, compliance with R 460.3411(13) of the Michigan administrative code is not required for the municipally owned utility. Concurrent with the filing of an election under this subsection with the commission, the municipally owned utility shall serve a copy of the election on the electric utility. Beginning 30 days after service of the copy of the election, the electric utility shall, as to the electing municipally owned utility, be subject to the terms of R 460.3411 of the Michigan administrative code as in effect on June 5, 2000. The commission shall decide disputes arising under this subsection subject to judicial review and enforcement. [MCLA 460.10y.]

Michigan Administrative Code Rule 460.3411 (Rule 411) states:

> **Extension of electric service in areas served by 2 or more utilities.**
>
> Rule 411. (1) As used in this rule:
>
> (a) "Customer" means the buildings and facilities served rather than the individual, association, partnership, or corporation served.
>
> (2) Existing customers shall not transfer from one utility to another.
>
> * * *
>
> (11) The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load.
>
> * * *
>
> (14) Regardless of other provisions of this rule, except subrule (9), a utility shall not extend service to a new customer in a manner that will duplicate the existing electric distribution facilities of another utility, except where both utilities are within 300 feet of the prospective customer. Three-phase service does not duplicate single-phase service when extended to serve a 3-phase customer. [Mich Admin Code, R 460.3411.]

INTRODUCTION

This case presents important questions concerning public and municipal utilities' rights to first entitlement, i.e., the right to continue providing service to a customer that a utility first served prior to any other utility. This case also involves the scope of the Michigan Public Service Commission's rules, the scope of this Court's decision in *Great Wolf Lodge of Traverse City, LLC v Public Service Commission*, 489 Mich 27; 799 NW2d 155 (2011), and the scope of MCLA 124.3.

On July 21, 2011, Coldwater purchased a 6.2 acre parcel of land on N. Angola Road in Coldwater Township for the purposes of constructing a water tower, waste water lift station and electric substation on the property for use by its Board of Public Utilities (BPU) (Complaint ¶¶ 16, 18). Coldwater purchased the 6.2 acre parcel from Deters Electric, Inc. (Exhibit 3, Admission Answer ¶ 7)[2], an existing customer of Consumers. Consumers' records indicate that it began providing electric service to Deters Electric in approximately 1990 and that on June 28, 2011, 24 days before Coldwater's purchase was finalized, Consumers received a request from Deters Electric to turn off the electricity at this address and the turnoff was completed on July 1, 2011 (Exhibit 4, Szostak Affidavit ¶¶ 3-4).

Recognizing that Consumers was already providing electric service to this property, the City Manager for the City of Coldwater wrote to Consumers on October 21, 2011, requesting that Consumers consent to having the BPU provide the electric service to the City's planned new facilities (Exhibit A of the Complaint attached as Exhibit 6). Consumers politely declined the

[2] The Exhibits referenced in this Supplemental Brief are attached to Defendant-Appellant's initial Brief and can be found there.

City's request in a letter dated December 4, 2012 (Exhibit B of the Complaint attached as Exhibit 6).

Coldwater filed a lawsuit on April 2, 2013, seeking a declaratory judgment that its BPU and not Consumers has the right to provide electricity to Coldwater's newly-acquired property in Coldwater Township. The trial court found that Coldwater was entitled to a declaratory judgment. (Exhibit 2). The Court of Appeals affirmed, holding that MCLA 124.3 did not prohibit Coldwater's actions, and that neither the Public Service Commission's Rule 411 nor this Court's decision in *Great Wolf Lodge* interpreting Rule 411 controlled the outcome here. (Exhibit 1).

Reversal of the Court of Appeals' published decision is warranted for several reasons. First, whether the Public Service Commission's Rule 411 provides a right that first-serve utilities can rely upon or is instead a rule that municipal utilities can avoid is of great significance to how Michigan courts administer the interaction between public and municipal utilities. MCR 7.302(B)(3). Basically, can a municipal utility avoid Rule 411 by acquiring property that was first served by a public utility.

Second, the Court of Appeals' decision conflicts with the reasoning of this Court's decision in *Great Wolf Lodge*. MCR 7.302(B)(5). In *Great Wolf Lodge*, this Court was unequivocal: customers "may not circumvent the limitations of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation." 489 Mich. at 42. Based on the Court of Appeals' decision, a municipal utility can avoid the ruling in *Great Wolf Lodge* merely by becoming the owner of the property and relying on the Court of Appeals' decision that none of the principles in *Great Wolf Lodge* apply to a municipal utility, regardless of what utility may have originally served the property. In *Great Wolf Lodge*, this Court stated

that the right to serve was not affected by changes in the customer: "That right was unaffected by subsequent changes in the "customer," because the right extends to the "premises" of the "buildings and facilities" that existed at the time service was established." 489 Mich. at 41. The Court of Appeals has created an exception to this language by creating a definition of customer for MCLA 124.3(2) that is inconsistent with this Court's definition that the right to serve extends to the "premises". The definition created by the Court of Appeals renders MCLA 124.3(2) ineffective or at the least easily avoidable. This exception invites municipalities to circumvent the holding in *Great Wolf Lodge*, merely by building demolition, causing a break in service, a change in customer or by purchasing the property themselves.

Finally, the Court of Appeals' decision is clearly erroneous and will cause material injustice. MCR 7.302(B)(5). As explained below, both Rule 411(11) and MCLA 124.3 prohibit Coldwater's actions here. Once a utility is the first "to provide electric service to buildings" on a parcel, Rule 411(11) gives that utility "the right to serve the entire electric load on the premises." *Great Wolf Lodge*, 489 Mich. at 41. And that "right [i]s unaffected by subsequent changes in the customer" or by "[l]ater destruction of the buildings and facilities on the property." *Id.* But the utility's "right" to continue service is a nugatory right indeed if it can be circumvented simply by a municipal utility via building demolition, a break in service, a change in property ownership or by purchasing the property themselves.

For all these reasons, and those explained in more detail below, Consumers respectfully requests that the Court reverse the Court of Appeals.

STATEMENT OF PROCEEDINGS AND FACTS

A. The Parties and the Action

The City of Coldwater filed a declaratory judgment action against Consumers, on April 2, 2013, in Branch County Circuit Court. In the suit, Coldwater sought a declaratory judgment authorizing Coldwater to provide electric service to a 6.2 acre parcel Coldwater had purchased from Deters Electric, Inc., a then existing customer of Consumers.

B. History of Electrical Supply to the 6.2 Acre Parcel

Defendant Consumers is a public utility in the business of generating, purchasing, distributing and selling electric energy to approximately 1.8 million retail customers (including about 4 million residents) in the State of Michigan, including customers in Coldwater Township, Branch County, Michigan. Consumers is a successor to Southern Michigan Light and Power Company which was first franchised to provide electricity to customers in Coldwater Township in 1928. The most recent renewal of Consumers' franchise in Coldwater Township was on November 22, 1988, and that 30-year franchise remains in effect until November 22, 2018. It is undisputed that Consumers holds franchises to provide electricity to customers in Coldwater Township (Exhibit 3, Admission Answer ¶20).

Coldwater operates a municipal utility known as the Board of Public Utilities or "BPU" which, *inter alia*, provides electric service to customers in the City and in some instances, in adjacent townships (Complaint ¶ 4). On July 21, 2011, Coldwater purchased a 6.2 acre parcel of land on N. Angola Road in Coldwater Township for the purposes of constructing a water tower, waste water lift station and electric substation on the property for use by the BPU (Complaint ¶¶ 16, 18).

Coldwater purchased the 6.2 acre parcel from Deters Electric, Inc. (Exhibit 3, Admission Answer ¶ 7), an existing customer of Consumers. Coldwater has never provided electric service

to Deters Electric, Inc. or any other customer on this parcel of land (Exhibit 3, Admission Answer ¶ 15). Consumers' records indicate that it began providing electric service to Deters Electric in approximately 1990 and that on June 28, 2011, 24 days before Coldwater's purchase was finalized, Consumers received a request from Deters Electric to turn off the electricity at this address and the turnoff was completed on July 1, 2011 (Exhibit 4, Szostak Affidavit ¶¶ 3-4).

Coldwater acknowledged that when it purchased the property, Consumers already had facilities in place to provide electricity to that property, including an electric meter attached to the existing building on the premises (Exhibit 3, Admission Answers ¶¶ 3, 18). Coldwater further acknowledged that not only had Consumers previously served the customer on this parcel of land (Deters Electric), but also other customers as well on N. Angola Road (Exhibit 3, Answer ¶ 4).

Consumers is a successor to Southern Michigan Light and Power Company (Exhibit 4, Szostak Affidavit ¶ 6). Coldwater acknowledges that there is a recorded easement in favor of Southern Michigan Light and Power Company for electric right of way across the parcel of land in question from 1929, which shows up in the title work relating to Coldwater's purchase of this parcel (Exhibit 3, Admission Answer ¶ 12).

Coldwater admits that an investment was made in the poles, wires, transformers and other equipment and facilities necessary for Consumers to provide electric service to the parcel in question and to other neighboring customers on Angola Road (Exhibit 3, Admission Answer ¶ 19). Coldwater's planned use of the property requires three-phase service and Consumers still has facilities on the property and has three-phase electric service within 500 feet of this parcel of land (Exhibit 3, Admission Answers ¶¶ 31, 32). In contrast, Coldwater would need to build new

facilities in order to serve this parcel (Exhibit 3, Admission Answer ¶ 9) and has no facilities along Angola Road.

Recognizing that Consumers was already providing electric service to this property, the City Manager for Coldwater wrote to Consumers on October 21, 2011, requesting that Consumers consent to having the BPU provide the electric service to the City's planned new facilities (Exhibit A of the Complaint). Consumers politely declined the request in a letter dated December 4, 2012 (Exhibit B of the Complaint).

Coldwater filed a lawsuit on April 2, 2013, seeking a declaratory judgment that its BPU and not Consumers has the right to provide electricity to Coldwater's newly-acquired property in Coldwater Township.

C. Trial Court Proceedings

This lawsuit was commenced on April 2, 2013. Consumers filed its Answer to Complaint on May 1, 2013 and both parties conducted written discovery. At a pretrial conference on July 2, 2013, both parties candidly informed the Court that there were likely to be few if any factual disputes in this case and that the parties anticipated that the case would be presented to the Court for a decision on cross motions for summary disposition.

Both parties filed summary disposition motions and oral argument on the motions was held on November 21, 2013. The Court issued its opinion and order on January 15, 2014, granting Coldwater's motion for summary disposition and denying Consumers' motion for summary disposition. (Exhibit 2, November 21, 2013 Opinion and Order) Although not argued by Coldwater, the Circuit Court concluded that because Coldwater wishes to provide service to itself as the customer, Rule 411 does not apply. There is no such exception contained within Rule 411. Consumers filed a timely appeal with the Court of Appeals.

D. Court of Appeals' Proceedings

The Court of Appeals consolidated this case with another appeal involving the City of Holland, COA Case No 315541. On appeal in the Coldwater case, Consumers made several arguments. First, it argued that the Circuit Court erred by creating a new exception to MPSC Rule 411 that did not previously exists. (Exhibit 5, Consumer's Brief at 9-11). Second, Consumers argued that the Circuit Court erred by failing to apply MCLA 124.3 to the facts of the case. *Id*. at 12-14. Third, Consumers argued that the Circuit Court erred in finding Rule 411 inapplicable and erred by failing to follow this Court's binding precedent in *Great Wolf Lodge*. *Id*. at 21-25. In particular, Consumers argued that there was no relevant distinction between the facts in this case and *Great Wolf Lodge*.

The Court of Appeals rejected Consumers' arguments. (Exhibit 1). It held that "Rule 411 does not apply to municipal utilities." *City of Holland v Consumers Energy Co*, 308 Mich App 675, 695; 866 NW2d 871 (2015). Next, it held that: "Under both MCLA 124.3 and Rule 411(1)(a), 'customer' means the building and facilities served. … Thus at the time Coldwater acquired the property and sought to demolish the pole barn building and provide electrical service to potential newly built buildings, there was no customer (buildings or facilities) already receiving (present tense) the service from Consumers." *Id* at 698. Despite the language of this Court's holding in *Great Wolf Lodge*, the Court of Appeals also held that:

> The *Great Wolf Lodge* decision does not direct otherwise. Consumers states that after this decision, the Rule 411 definition of customer is the premises of the buildings and facilities that existed at the time service was established." *Id* at 697.
>
> * * *
>
> *Great Wolf Lodge*, therefore, was not defining 'customer' for purposes of Rule 411 (and was not expanding the definition) but was explaining the parameters of Rule 411(11) and the rights therein. *Id* at 698.

Judge Shapiro concurred. He stated that Consumers "rightly observes that the substantive language in *Great Wolf Lodge* was sweeping and, in that case, it was of no consequence that the utility provider to whom the premises owner sought to 'switch' was a municipal power company rather than another PSC-regulated utility." *Id* at 699. On the other hand, he noted that the "municipalities rightly point out that whatever the *substantive* interpretation of Rule 411, it cannot be enforced against a party that does not fall within the jurisdiction of the PSC." *Id*. at 699. Judge Shapiro concluded that because "Since an absence of jurisdiction trumps any substantive interpretation of Rule 411, I would not apply the rule in this case absent a clear directive to do so from the Supreme Court." *Id*. at 700. Looking at MCLA 124.3(2) he stated "where a customer is not 'receiving' service, it may contract with the provider of its choice even if there was some other entity that was 'the first utility' to serve the premises." *Id* at 700. While he agreed that the "majority's conclusions [were] consistent" with MCLA 124.3 and *Great Wolf Lodge*, he stated, that to "the degree they [were] not, the Legislature and/or the Supreme Court may take appropriate action." *Id* at 700. Judge Shapiro thus invited this Court to clarify the scope of its holding in *Great Wolf Lodge*.

Accordingly, the Court of Appeals affirmed the circuit court's decision. Consumers then timely filed this application for leave to appeal to this Court.

ARGUMENT

A. *Great Wolf Lodge* Controls the Circumstances at Issue Here.

The Court of Appeals fundamentally misread this Court's recent decision in *Great Wolf Lodge*. Indeed, the Court of Appeals' published decision effectively guts this Court's holding and reduces its application to a small group of cases. Basically, the Court of Appeals' decision

provides a roadmap for any municipality to provide electric service to any current or past customer of a public utility. This Court should grant Consumers' application to clarify that *Great Wolf Lodge* applies to all premises that were first served by a public utility regardless of who or what entity owns the premises. This Court should grant Consumers' application to clarify the definition of customer within MCLA 124.3, determine the consequences of a municipality being a customer of a public utility and state under what circumstances the first serving utility can be replaced by another utility.

1. Great Wolf Lodge

In *Great Wolf Lodge*, Cherryland Electric Cooperative began providing electricity to the property at issue in the 1940s. 489 Mich at 32. The property was originally used for farming but after the last farming tenant left in 2011, "the electricity was turned off." *Id*. While the property owner continued to pay "a minimum monthly bill . . . so that it had the option to have the electricity turned back on," there was no dispute that Cherryland was not providing electric service after 2011 for a period of time. When the property owner began planning new construction, it solicited bids for electric service. Traverse City Light & Power ("TCLP"), a municipal utility, was the winning bidder. When the remaining farm buildings were scheduled to be removed, the owner asked Cherryland to remove its service drop so that "the building it was attached to could be taken down." *Id*. Cherryland conditioned removal on the owner making Cherryland the electric provider for the owner's new development. The owner consented.

Later, the owner, Great Wolf Lodge, filed a complaint with the Public Service Commission, asking, for among other things, a declaration that Great Wolf Lodge could switch electric service providers. The Commission ruled in favor of Cherryland on this question as did the trial court. The Court of Appeals concluded that the "record was insufficient to determine whether there was an existing customer" under Rule 411 when the property owner solicited bids

for electric service, and it remanded to the Commission for further factual development. *Id*. at 37. This Court then granted Cherryland's application for leave to appeal and reversed the Court of Appeals.

In its opinion, this Court noted that the Public Service Commission adopted Rule 411 "to avoid unnecessary and costly duplication of facilities." *Id*. at 37 (quoting In re Regulations Governing Service Supplied by Electric Utilities, order of the Public Service Commission, entered July 13, 1982 (Case No. U–6400), p. 10) (internal quotation marks omitted). This Court further noted that Rule 411(11) states that the " 'first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer.' " *Id*. at 38 (quoting Rule 411(11)). This Court also noted that Rule 411(1)(a) "defines 'customer' as the 'buildings and facilities served rather than the individual association, partnership, or corporation served.'" *Id*. (quoting Rule 411(1)(a)). This Court looked to PSC Rule 102(f) for the definition of "premises." That provision defines " 'premises' as 'an undivided piece of land which is not separated by public roads, streets, or alleys.'" *Id*. (quoting Mich Admin Code, R 460.3102(f)).

This Court held that incorporating these definitions into Rule 411 renders it as follows:

> The first utility serving [buildings and facilities] pursuant to these 1rules is entitled to serve the entire electric load on the [undivided piece of land which is not separated by public roads, streets, or alleys] of [those buildings and facilities] even if another utility is closer to a portion of the [buildings and facilities'] load. [*Id*. at 39.]

This means that

> Rule 411(11) grants the utility first serving buildings or facilities on an undivided piece of real property the right to serve the entire electric load on that property. The right attaches at the moment the first utility serves "a customer" and applies to the entire "premises" on which those buildings and facilities sit. The later destruction of all buildings on the property or division of the property by a public road, street, or alley does not extinguish or otherwise limit the right. This conclusion is consistent with the rule's purpose of avoiding unnecessary duplication of electrical facilities. [*Id*.]

This Court rejected the argument that "this right of first entitlement lasts only as long as an 'existing customer' is being served." *Id*. at 40. Rather, "Rule 411(11) explicitly ties the right of entitlement to the premises, not to the customer. Notably, nothing in Rule 411 or elsewhere in the PSC rules indicates that this right of first entitlement terminates if the initial customer, the initial 'buildings and facilities served,' changes." *Id*. at 40.

In *Great Wolf Lodge*, it was "undisputed that Cherryland was the first utility to provide electric service to buildings and facilities on the [property]." *Id*. at 41. Thus, "[o]nce Cherryland did so, Rule 411(11) gave [Cherryland] the right to serve the entire electric load on the premises." *Id*. Moreover, this "right was unaffected by subsequent changes in the 'customer,' because the right extends to the 'premises' of the 'buildings and facilities' that existed at the time service was established." *Id*. Even "[l]ater destruction of the buildings and facilities on the property" did not "extinguish that right." *Id*.

Significantly, this Court held that it was "irrelevant that TCLP is a municipal corporation not subject to PSC regulation." *Id*. This was because Cherryland was the utility "entitled to the benefit of the first entitlement in Rule 411(11)." *Id*. As this Court noted, Rule 411(11) "both *grants and limits* rights." *Id*. (emphasis added). Indeed, Rule 411(11) "grants a right to first entitlement" to a Commission-regulated utility "while limiting *the right of the owner of the premises* to contract with another provider for electric service." *Id*. at 42 (emphasis added).

While it is true that in *Great Wolf Lodge*, the "Plaintiff put [Rule 411's] limitation directly at issue by seeking a declaratory ruling," nothing in this Court's opinion limited Rule 411's limitations to those circumstances. Indeed, the logic of this Court's holding applies equally to the circumstances at issue here. Nothing in this Court's language in *Great Wolf Lodge* suggests that the right of customer is only limited when it has subjected itself to the Public

Service Commission's jurisdiction. If, as this Court held in *Great Wolf Lodge*, the customer "may not circumvent the limitations of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation," the same is true where the municipal utility acquires a premise and then claims by its ownership that the rights of the first serving utility are extinguished. A customer, whether a municipal utility or not, cannot avoid Rule 411's limitations simply by acquiring ownership of the property. In other words, a municipality should not be able to become a customer (owner of premises previously served by a public utility) and then claim that the rules that apply to customers, do not apply to it.

Indeed, this Court's reasoning in a footnote in *Great Wolf Lodge*, responding to the dissent, would appear to apply equally to the circumstances at issue in this case:

> Our disagreement with the dissent appears when the scope of [the] right [of first entitlement] is fully defined. The dissent does not view the parameters of the right of first entitlement in Rule 411(11) as firmly established when the utility first serves a customer. Instead, it is an undefined right that a property owner *is free to vitiate at any time* by tearing down all of the "customers" on the property. Similarly, a later-constructed road dividing the property in two would create a new "premises," hence a new "customer," if there were no buildings being served on the newly defined "premises." This approach leaves the utility's right of first entitlement undefined, *wholly outside the control of the utility and the PSC*, and *subject to unilateral abrogation by property owners*. This result would be contrary to the purpose of keeping "[t]he electric transmission and distribution businesses ... under a regulated monopoly utility structure." [*Id*. at 40 n 22 (emphasis added)]

Yet this is exactly what the Court of Appeals' decision allows here. Under the Court of Appeals' holding, any property that is acquired by Coldwater is now an exception to the holding of *Great Wolf Lodge*. This Court, however, did not so limit its holding in *Great Wolf Lodge*. *Great Wolf Lodge* applies to these circumstances and the Court of Appeals erred by not seeing it as controlling.

Basically both the Court of Appeals and Coldwater want to ignore the premises rule as stated by this Court. Further, the Court of Appeals and Coldwater forget that the entity bound by the premises rule is the customer/premises served by a public utility. The fact that initially receiving service from a first providing utility, then binds that customer/premises does not impose Rule 411 on a Municipality unless it is in the role of a customer/premises owner.

Taken to its logical end, Coldwater has to claim that even if it is receiving service from Consumers Energy, it would not be a customer of Consumers Energy and apparently not bound by the rules and regulations of service as all other Consumers Energy customers are bound. In other words, apparently Coldwater can purchase a premise causing a break in the premises rule and Coldwater can then serve the premise itself. As an alternative, Coldwater could decide to continue to receive service from Consumers, however according to Coldwater, it would not have to pay the same rates as other customers as it is immune from MPSC oversight of any type.

A more logical position is that when Coldwater acts as a customer/premises purchaser (in this case acquiring a parcel of property already served by Consumers Energy), it has all the responsibilities and obligations of any other customer and is bound by this Court's holding in *Great Wolf Lodge*.

This is supported by this Court's holding when this Court stated: it was "irrelevant that TCLP is a municipal corporation not subject to PSC regulation." *Id.* Indeed, Rule 411(11) "grants a right to first entitlement" to a Commission-regulated utility "while limiting *the right of the owner of the premises* to contract with another provider for electric service." *Id.* at 42 (emphasis added). Acting as an owner of the premises, Coldwater should be bound by the same rules as any other premises owner.

To clarify the scope of *Great Wolf Lodge*, and to close the enormous loophole in *Great Wolf Lodge* that the Court of Appeals has created, this Court's immediate review and reversal of the Court of Appeals is necessary.

2. The Fundamental Purpose of Rule 411 is Undermined by the Court of Appeals' Decision.

As this Court noted in *Great Wolf Lodge*, the Public Service Commission enacted Rule 411 to "avoid unnecessary and costly duplication of facilities." Rule 411(14) states, that "a utility shall not extend service to a new customer in a manner that will duplicate the existing electric distribution facilities of another utility, except where both utilities are within 300 feet of the prospective customer." Mich Admin Code, R 460.3411(14). The Court of Appeals' holding undermines this purpose. Because the Court of Appeals' decision makes the right of first entitlement "subject to unilateral abrogation by property owners," something which this Court explicitly rejected in *Great Wolf Lodge*, this Court should reverse the Court of Appeals. 489 Mich at 40 n 22.

Even a brief review of the facts shows how the Court of Appeals' opinion undermines these larger purposes and explicit goals of Rule 411. Consumers is a successor to Southern Michigan Light and Power Company which was first franchised to provide electricity to customers in Coldwater Township in 1928. The most recent renewal of Consumers' franchise in Coldwater Township was on November 22, 1988, and that 30-year franchise remains in effect until November 22, 2018. On July 21, 2011, Coldwater purchased a 6.2 acre parcel of land on N. Angola Road in Coldwater Township for the purposes of constructing a water tower, waste water lift station and electric substation on the property for use by the BPU (Complaint ¶¶ 16, 18). Coldwater purchased the 6.2 acre parcel from Deters Electric, Inc. (Exhibit 3, Admission Answer ¶ 7), an existing customer of Consumers. Coldwater has never provided electric service to

Deters Electric, Inc. or any other customer on this parcel of land (Exhibit 3, Admission Answer ¶ 15). Consumers' records indicate that it began providing electric service to Deters Electric in approximately 1990 and that on June 28, 2011, 24 days before Coldwater's purchase was finalized, Consumers received a request from Deters Electric to turn off the electricity at this address and the turnoff was completed on July 1, 2011 (Exhibit 4, Szostak Affidavit ¶¶ 3-4).

Coldwater acknowledged that when it purchased the property, Consumers already had facilities in place to provide electricity to that property, including an electric meter attached to the existing building on the premises (Exhibit 3, Admission Answers ¶¶ 3, 18). Coldwater further acknowledged that not only had Consumers previously served the customer on this parcel of land (Deters Electric), but also other customers as well on N. Angola Road (Exhibit 3, Answer ¶ 4). Coldwater acknowledges that there is a recorded easement in favor of Consumers.

Coldwater admits that an investment was made in the poles, wires, transformers and other equipment and facilities necessary for Consumers to provide electric service to the parcel in question and to other neighboring customers on Angola Road (Exhibit 3, Admission Answer ¶ 19). Coldwater has no electric facilities along Angola Road. Coldwater's planned use of the property requires three-phase service and Consumers already has three-phase electric service within 500 feet of this parcel of land (Exhibit 3, Admission Answers ¶¶ 31, 32). In contrast, Coldwater would need to build new facilities in order to serve this parcel (Exhibit 3, Admission Answer ¶ 9).

Recognizing that Consumers was already providing electric service to this property, the City Manager for Coldwater wrote to Consumers on October 21, 2011, requesting that Consumers consent to having the BPU provide the electric service to the City's planned new

facilities (Exhibit A of the Complaint, attached as Exhibit 6). Consumers politely declined the request in a letter dated December 4, 2012 (Exhibit B of the Complaint, attached as Exhibit 6).

The Court of Appeals decision has now opened a loophole by which a municipal utility is not bound by Rule 411 when it acquires a piece of property that was previously served by another utility. This obviously then entails the construction of costly duplicate facilities. Coldwater would have to actually construct facilities to serve the property. This increases costs to all customers – Consumers has facilities no longer economically supported by a lost customer; Coldwater has a new customer that current customers must pay for the installation of new, duplicative facilities. While there is no dispute that the Public Service Commission does not have jurisdiction over municipally owned utilities while acting as a utility, the Court of Appeals' decision goes beyond upholding that principle. It allows a municipal utility, when acting as a customer, to not follow the rules of those customers. More importantly, the Court of Appeals allows the status of a first served premise to change due to who owns the property. An interesting question would be, what if the municipal utility then later sold, rented or leased the property – who would have the right to serve that property? In truth, the Court of Appeals' decision gives municipal utilities a roadmap to poach Commission-regulated utilities' customers or change the status of a first served premise: purchase the property and by the purchase extinguish the rights of the first utility that served that property. The Court of Appeals' decision fundamentally undermines the whole aim and purpose of Rule 411: granting public utilities the right of first entitlement.

As Coldwater states in its Reply:

> The plain meaning of the phrase customers "already receiving the service" is that the customer must currently be receiving service in order for the municipal utility to be precluded from serving. 14 The Court of Appeals explicitly acknowledged and gave effect to

> this statutory language, stating "[n]otably, the phrase '"already receiving"' is in the present tense." (COA Op at 4, 11; Ex 1.) The test is not whether the regulated utility served in the recent past, still has equipment on the property, or professes a willingness to resume service. The regulated utility must actually be providing electric power to the buildings and facilities. That is what the statute says and that should be the end of the matter. Reply pg. 23.

Thus the ability to prevent switch from one utility to another as stated by the Court of Appeals and championed by Coldwater is that only customers "presently receiving" service from a Public Utility are prevented from switching to a municipal utility.[3] If not receiving service "present tense", there is no restriction on switching and "that should be the end of the matter". Reply pg. 23. The consequences of the new rule created by the Court of Appeals and supported by Coldwater will have profound consequences on the ability of a Public Utility to retain customers.

According to the Court of Appeals' new "presently receiving" service rule, any break in service would allow a customer to switch. In addition, a Municipal Utility could offer special rates or discounts (not available to a utility regulated by the MPSC) to entice customers to do so. Coldwater ignores the ease by which there could be a break in service and instead touts it as an opportunity to gain customers in suburban areas. Reply pg. 9. Some examples of ways that a customer could change electric providers by a break in service include:

- When a business is sold, the prior owners could ask for a shut off of electric service, the new owners could then choose the original provider or a new provider.

[3] As noted in Defendant's original brief, the Court of Appeals reads the definition of customer in MCLA 124.3(2) to require presently receiving service. The Court of Appeals thus ignores this Court's interpretation of customer in *Great Wolf Lodge*.

- When a home is sold, the prior owners could ask for a shut off of electric service and the new owners could then choose the original provider or a new provider.
- A business at any time could ask that service be stopped or removed from its building. The business would then be free to switch electric providers.
- A homeowner at any time could ask that service be stopped or removed from their residence. The residence would then be free to switch electric providers.
- A large development, originally served by one provider, could have all new buildings and construction served by a different provider.

Using the Court of Appeals "presently receiving service rule" basically allows customers to leave the Public Utility at any time just by stopping service, even just for a moment.

Coldwater then claims that there is very little duplication of service brought about in this instant case and thus tries to downplay this public policy consideration. However even Coldwater admits that it will have to construct a new "electric substation on the property" to provide the electric service already available by a currently constructed Consumers Energy substation.[4] Plus, when looking at these types of public policy issues, the focus is not on the duplication of facilities for this one case, but rather the consequences for the entire populace. If widespread switching occurred, then not only would facilities at each location be duplicated (all at varying costs) but different customers would be disadvantaged in different ways. Current customers of the Municipal Utility would have to absorb the cost of the newly built duplicative facilities built to serve the new customer(s). Current customers of the Public Utility would have to absorb the cost of already built facilities that are no longer financially supported by the customers the facilities were originally built to serve. While Municipal Utilities increase their

[4] Even a basic substation tends to cost in the hundreds of thousands of dollars to construct.

number of electric customers, the remaining customers of the Public Utility will have to foot the bill for each customer that switches.

As this Court noted in *Great Wolf Lodge*, the Public Service Commission enacted Rule 411 to "avoid unnecessary and costly duplication of facilities." The Court of Appeals' holding undermines this purpose and ignores that purpose in its reading of MCLA 124.3(2). The Court of Appeals' decision makes the right of first entitlement "subject to unilateral abrogation by property owners," something which this Court explicitly rejected in *Great Wolf Lodge*. 489 Mich at 40 fn 22.

The ability of the Municipal Utility to obtain customers first served by a Public Utility causes duplication in facilities and increased costs to customers. This defeats the purpose of MCLA 124.3(2) and renders it nugatory. This is also in contradiction to this Court's holding in *Great Wolf Lodge*. This is all the more reason for this Court to reverse the Court of Appeals.

B. The Court of Appeals Construction of MCLA 124.3 Renders it Nugatory.

This Court should reverse the Court of Appeals as the Court of Appeals' interpretation of MCLA 124.3 and the way it defines customer in contradiction to *Great Wolf Lodge* renders MCLA 124.3 nugatory and provides municipal utilities a method for poaching a public utility's customers. Indeed, the Court of Appeals' interpretation is an example of statutory construction gone awry.

The goal of statutory interpretation is always to determine the Legislature's intent. *Whitmore v City of Burton*, 439 Mich 303, 311; 831 NW2d 223 (2013). The first step toward discovering that intent is to examine the text of the statute. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute is unambiguous as written, the plain meaning of the language controls. *Parkwood Ltd Dividend Hous Ass'n v State Hous Dev Auth*, 468 Mich 763, 772; 664 NW2d 185 (2003). That said, courts refrain from reading meanings into

a statute that are not within "the manifest intent of the legislature." *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999). Accordingly, when "construing a statute, a court should not do so at the expense of common sense." *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 15; 687 NW2d 309 (2004), aff'd 474 Mich 36; 709 NW2d 589 (2006). "Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest." *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). Moreover, "a reviewing court should not interpret a statute in such a manner as to render it nugatory." *Apsey v Mem Hosp*, 477 Mich 120, 131; 730 NW2d 695 (2007). "A statute is rendered nugatory when an interpretation fails to give it meaning or effect." *Id*.

The Court of Appeals reading of MCLA 124.3 runs contrary to the plain language of the statute, leads to absurd results, renders it nugatory, and undermines its purpose. MCLA 124.3(2) states that a "municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing." While MCLA 124.3 does not define "customer," the term is defined in MCLA 460.10y(2). That subsection states that " 'customer' means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service." Thus, MCLA 460.10y(2) adopts the same definition of "customer" as Rule 411. And, based on the principle of *in pari materia*, MCLA 124.3(2)'s use of the term customer should be read the same way as MCLA 460.10y's use of the same term. See, e.g., *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007) ("Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole.") Accordingly, for purposes of MCLA 124.3, customer is the "building or facilities" served. The term "facilities" is not defined in MCLA 460.10y so it is

appropriate to turn to the dictionary meaning of the term. Facility is defined as "something such as a *place*, building, or equipment used for a particular purpose or activity." *Cambridge Dictionary (4th ed).* The Court of Appeals cited *The American Heritage Dictionary (4th ed)* definition as "something created to serve a particular function." *Id* at 12.

Thus, for the purposes of MCLA 124.3(2), the whole of the 6.2 acres purchased by Coldwater was a facility, as this was the *place* first established by Deter Electric to provide its services and then sold to Coldwater as the *place* to construct a water tower, waste water lift station and electric substation. The Court of Appeals erred, then, when it held that "customer" meant buildings or facilities receiving electrical service at that moment. "[T]here was no customer (**buildings** or facilities) already receiving (**present tense**) the service from Consumers." Slip op at 12, emphasis added. Certainly, if customer were limited to a "building" that was "already receiving" service, the Court of Appeals' reading would have merit to it. But, because the definition of customer includes facility, the customer in this case was the entire 6.2 acre parcel. There can be no dispute that Consumers was serving this establishment or facility prior to Coldwater acquiring the property.

The limitations that the Court of Appeals has added to MCLA 124.3(2) provides a clear path for municipal utilities that want to take customers from the first serving utility. Under the Court of Appeals' construction, the only customers a public utility would not be able to "render electric delivery service" to would be those who were receiving the service from another utility at the very moment the municipal utility began to provide its service. In other words, all a municipal utility would need to do to avoid violating MCLA 124.3(2) under the Court of Appeals' reading would be to wait to provide service to the customer until the prior utility had shut off its service, even if just for a moment.

It is immaterial here that there would be a gap between when Consumers stopped service to the prior occupant of the property and any time Coldwater may begin to provide electricity to the 6.2 acre parcel. What occurred was fundamentally contrary to MCLA 124.3's language and purpose: Coldwater obtained a parcel of property first served by Consumers and by having the current occupant of the property end electric service with Consumers, this (according to the Court of Appeals) opened the door for Coldwater to begin serving that parcel.

The ability of the municipal utility to obtain customers first served by a public utility causes a duplication in facilities and increased costs to customers. This defeats the purpose of MCLA 124.3(2) and renders it nugatory. Accordingly, this Court should correct the Court of Appeals' erroneous reading of MCLA 124.3.

C. Consequences of Overruling *Great Wolf Lodge*.

Coldwater complains that this Court has "upset the apple cart" (Reply pg. 2). In reality, the Court of Appeals has upset the settled law as pronounced by this Court in *Great Wolf Lodge;* opening the door for Municipal Utilities to not be restricted in their pursuit of customers of Public Utilities. The consequences of allowing Municipal Utilities to take or lure away current customers of Consumers and other Public Utilities will have a significant impact on the provision of electric service in this State and thus impact all residents of this State.

As stated by the Court of Appeals and championed by Coldwater only customers "presently receiving" service from a Public Utility are prevented from switching to a Municipal Utility. If not receiving service "present tense", there is no restriction on switching and "that should be the end of the matter".[5] Duplication of facilities is not a consideration under this scenario. However, as recognized by this Court in *Great Wolf Lodge* pg. 39:

[5] Ignoring the goal to prevent duplication of facilities, Coldwater states in its brief at page 23: "The test is not whether the regulated utility served in the recent past, still has equipment on the

> Thus, Rule 411(11) grants the utility first serving building or facilities on an undivided piece of real property the right to serve the entire electric load on that property. The right attaches at the moment the first utility serves "a customer" and applies to the entire "premises" on which those buildings and facilities sit. The later destruction of all buildings on the property or division of the property by a public road, street, or alley does not extinguish or otherwise limit the right. This conclusion is consistent with the rule's purpose of avoiding unnecessary duplication of electrical facilities. Pg. 39.
>
> The PSC adopted Rule 411 in 1982 as part of a comprehensive regulatory scheme for electric utilities. At that time, it stated that the purpose of Rule 411 was "to avoid unnecessary and costly duplication of facilities and to provide objective standards for extension of electric service…." Pg. 38.

Loss of customers by Consumers to a Municipal Utility obviously will cause a duplication of services as the lines and other supporting infrastructure (poles, cross arms, insulators, lines, transformers, substations, fusing, etc.) installed by Consumers to serve the initial customer/premises will no longer be needed or used.

Ironically, in the amicus brief filed by the Michigan Municipal Electric Association (MMEA) this issue was addressed, but only in support of the Municipal Utilities. This Court should note that both Coldwater and Holland are members of the MMEA. In the amicus brief of the MMEA, it stated:

> All electric utilities have high fixed costs. Long term investments must be made in transmission and distribution systems and generating facilities….Fixed costs are spread over the entire customer base. If the customer base declines, costs must be spread over a small base and rates must be increase to cover fixed costs, including interest and principal on outstanding debt. MMEA Brief pg. 7.

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property, or professes a willingness to resume service. The regulated utility must actually be providing electric power to the buildings and facilities. That is what the statute says and that should be the end of the matter."

The irony in MMEA's above statement is that it is made in support of the idea that customers should be allowed to switch to from Consumers to a Municipal Utility. Apparently the idea of Consumers losing its' customer base to various Municipal Utilities and then having to pass these costs onto the remaining customers is not a concern to MMEA. Basically as long as the Municipal Utility can poach whatever number of customers it wants from Consumers, then as least the Municipal Utility will always be able to cover its fixed costs. Remaining customers of Consumers are then left to fend for themselves.

A second significant consequence of allowing the Court of Appeals' and Coldwater's position to stand, is the risk to a switching customer of lack of price consistency or protection in price or service issues (due to a lack of regulatory oversight by the MPSC). The amicus brief filed by the Association of Businesses Advocating Tariff Equity (ABATE) espouses that they want an unregulated electric market, that businesses should be able to choose their preferred provider and that competition trumps all; all while making the error of ignoring the risks of their position.

The first error in ABATES's argument is the failure to recognize that the utility business is regulated for a reason. That reason is that it is both costly and impracticable to have multiple utilities trying to serve the same group of customers. Duplication of facilities is both expensive and not feasible (sets of duplicate power lines running through neighborhoods, along streets, in cities cannot all fit into the same space). An example of how the Court of Appeals' and Coldwater's position effect costs and expenses, if Consumers had run electric facilities to a group of customers and then a Municipal Utility decided to take one-half load, then the remaining fixed expenses and infrastructure development cost would double on the remaining

one-half of Consumers' customers. Any of ABATE's members that remained in the group of customers that were not able to switch would then have to pay twice as much for fixed costs.

The second error in ABATE's argument is the failure to realize that its argument does not allow full and fair competition and actually puts its constituents into a potentially worse position. According to ABATE, the Court of Appeals and Coldwater, a business can switch to a Municipal Utility if it interrupts service with Consumers in any manner. Thus a business could call Consumers and ask for an interruption in service at 3:00 pm and then ask the Municipal Utility to commence service at 3:01 pm. This would satisfy the requirement that the customer was not presently receiving service according to ABATE, the Court of Appeals and Coldwater. Full and fair competition would allow Consumers to do the same thing. However since Consumers is prohibited from taking customers from other utilities by MCLA 460.10y and Rule 411, Consumers cannot have customers momentarily shut-off service from a Municipal Utility and then restart with Consumers. Normally competition is a two way street, in the eyes of ABATE and Coldwater, one way competition is adequate.

Interestingly ABATE fails to realize the consequences to its members of the fact that ability to switch is only one way. A business customer could be lured to a Municipal Utility by promises of lower rates (the Municipal Utility is allowed to set its own rates unlike a Public Utility that must file rate cases before the MPSC). For example Business A could be promised a special developmental rate of one-half off the going rate. Business A then switches to the Municipal Utility. The Municipal Utility could then decide that it is not making enough money to cover costs at a one-half off rate, and then decide to increase the special developmental rate to twice the going rate. Business A could complain, but the Municipal Utility is allowed to change its rates (there is no MPSC oversight and a Municipal Utility is only not allowed to discriminate

against particular customers). Most importantly, Business A would not have the ability to switch back to Consumers as Consumers is prohibited from taking a customer from a Municipal Utility. Thus ABATE's member ends up actually being worse off. ABATE also fails to acknowledge that its various members that cannot obtain a special rate with a Municipal Utility will be forced to bear the increased fixed costs and expenses that Consumers incurs due to loss of other business customers. It is not unusual for those who are favored by one way competition to support that concept however when fully analyzed Coldwater's position actually is detrimental to ABATE and its members along with the public at large. This Court should thus reverse the Court of Appeals and not permit the consequences of that decision to take place in Michigan.

CONCLUSION AND REQUESTED RELIEF

This case raises jurisprudentially important issues regarding the relationship between public and municipal utilities, the scope of the Public Service Commission's rules, and the meaning of MCLA 124.3 and Rule 411. Moreover, the Court of Appeals' decision conflicts with this Court's decision in *Great Wolf Lodge*. This Court's intervention is necessary to clarify the scope of its holding in *Great Wolf Lodge* and to prevent municipal utilities from taking public utilities' customers – a scenario that would result in duplication of facilities and higher costs for all utility customers. Accordingly, this Court should reverse the decision of the Court of Appeals or in the alternative grant leave to appeal.

Respectfully submitted,

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